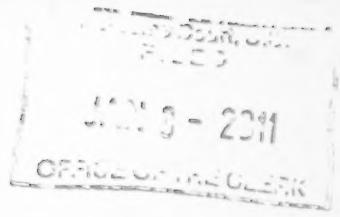

No. 10-735

In the

Supreme Court of the United States

PHILIP MORRIS USA INC., ET AL.,
Petitioners,

v.

DEANIA M. JACKSON,
ON BEHALF OF HERSELF AND
ALL OTHER PERSONS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari
to the Louisiana Fourth Circuit Court of Appeal

BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae DRI–The Voice of the Defense Bar is an international organization of more than 23,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys, to promote the role of defense attorneys, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system more fair, efficient, and—when national issues are involved—consistent.

To promote these objectives, DRI participates as *amicus curiae* in cases, like this one, that raise issues important to its membership, their clients, and the judicial system. This case is paradigmatic. To make this case "work" as a class action, the Louisiana courts simply dispensed with the requirement that the plaintiffs prove an essential—and inherently individualized—element of their fraud claims. Not surprisingly, distorting substantive law in this way in order to make class treatment feasible can have a considerable, and even dispositive, effect on countless class actions in virtually all contexts—contract, business tort, product liability, employment, insurance, securities, antitrust, etc. This Court's

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[1] Pursuant to Supreme Court Rule 37.6, DRI certifies that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from DRI, its members, and its counsel, made any monetary contribution toward the brief's preparation and submission. Pursuant to Supreme Court Rule 37.2(a), DRI further certifies that counsel of record for both parties received timely notice of DRI's intent to file this brief. Counsel consented to the brief's filing in letters that are on file with the Clerk's office.

review is essential to prevent improper forum shopping and to bring fairness, consistency, and predictability to high-stakes class action litigation.

SUMMARY OF THE ARGUMENT

There is no "class action" exception to the Due Process Clause. To the contrary, it is well settled that due process guarantees apply with full force to class action litigation, including class actions certified and tried in state courts. Accordingly, this Court has explained, the purely procedural class action device may not be employed in a manner that denies either plaintiffs or defendants their substantive constitutional rights. Class treatment must conform to due process, not vice versa.

A civil defendant's right to be heard and to present every available defense is among the Due Process Clause's essential guarantees. In this case, Louisiana's courts violated that guarantee when, in an effort to facilitate class treatment, they decreed an *ad hoc* exception to longstanding Louisiana fraud law. In particular, without any basis in existing precedent—and solely to impose class action procedures on the putative class members' inherently individualized claims—the courts below relieved the class plaintiffs of their burden to prove the "reliance" element of their fraud claims. As the trial court instructed the jury: "[P]laintiffs in this case do not have to establish individual reliance on specific concealments or misrepresentations made by these defendants." Pet. 7 (quoting 2003-07-24 Tr. 23506). By holding that the plaintiffs here—unlike other plaintiffs alleging fraud under Louisiana law—needn't demonstrate that any individual plaintiff actually relied on an alleged misrepresentation, the courts below impermissibly prevented the

defendants from contesting an essential element of the plaintiffs' claims and thereby deprived the defendants of due process.

This case provides the Court a unique and important opportunity to address the limits that the Due Process Clause places on state courts' use of the class action device. The Court should hold that state courts cannot facilitate class treatment by eliminating substantive protections that defendants would enjoy if class members' claims were tried individually.

The issue is of profound importance. Even after the enactment of the Class Action Fairness Act, which expands federal jurisdiction over class claims, many large class actions still must be litigated in state courts. Review of state class action procedures for constitutionality is notoriously difficult to obtain. The reason for the difficulty is clear. As a result of the coercive settlement pressures that class action defendants typically face—from potentially ruinous liability, runaway defense costs, poisonous publicity, etc.—the great majority of state class actions are resolved soon after certification, even those in which the plaintiffs' claims are weak. This case, one of the very few that has been litigated to judgment, thus presents this Court with a unique opportunity to address pressing (but review-evading) constitutional issues and provide state courts much-needed guidance.

The decision below, which approved a class action that relieved the plaintiffs of their burden to prove a necessary element of their claims, and thus eliminated an otherwise-available defense, threatens to increase exponentially the already-extortionate settlement pressures that class defendants confront. And perversely, that will

start the vicious cycle anew. As even fewer defendants are able to withstand the settlement pressure, and as more cases are resolved before trial, opportunities to scrutinize the very issues that give rise to the ratcheted-up pressure will further dwindle. This Court should seize the valuable opportunity that this case presents.

ARGUMENT

I. In An Effort To Make This Case "Work" As A Class Action, The Louisiana Courts Impermissibly Violated The Defendants' Due Process Right To Raise Every Available Defense.

This is a square-peg-round-hole case. In order to force some 500,000 plaintiffs' individual fraud claims into a class action posture, the Louisiana courts here effectively excused the plaintiffs' obligation to prove that they actually relied on defendants' supposed misrepresentations. In so doing, the courts—seemingly carving out a "class action" exception—ignored and distorted settled Louisiana fraud law. The question presented is whether, consistent with due process protections, a state court can cast aside otherwise applicable law in order to make a class action "work." The answer is no.

A. The Due Process Clause Guarantees Class Action Defendants The Right To Be Heard And To Present Every Available Defense.

The Due Process Clause indisputably constrains the conduct of litigation in state courts. *See, e.g.*, *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 680 (1930) ("The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative, branch of gov-

ernment."). It is likewise settled (and evidenced by the reference in the Clause to "property" alongside "life" and "liberty") that due process protections extend to the litigation of *civil lawsuits*. *See, e.g.*, *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877) ("[T]here can be no doubt" that "due process of law," "when applied to judicial proceedings," "mean[s] a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights."). Finally, and most importantly here, it is settled that due process guarantees apply to state-court *class actions*. Although "[s]tate courts are generally free to develop their own rules for protecting against the relitigation of common issues," this Court has "long held ... that extreme applications" of such rules "may be inconsistent with ... federal right[s] that [are] fundamental in character." *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 797 (1996) (internal quotation marks omitted). That commonsense principle—that state-court procedure must conform to constitutional command—has been repeatedly recognized and applied in the class action context. *See, e.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 847–48 & n.24 (1999); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985); *Hansberry v. Lee*, 311 U.S. 32, 42–43, 45 (1940).

This Court has already identified several specific "minimal procedural due process protection[s]" that apply in state court class actions, including notice, an opportunity to be heard, the right to opt out, and adequate representation. *Phillips Petroleum*, 472 U.S. at 811–812. *See also Hansberry*, 311 U.S. at 42–43, 45 (explaining representation requirement). Conversely, this Court has never suggested that a due process protection that applies in ordinary civil litigation can simply be jettisoned

in the class context. Class action defendants in state court, therefore, are entitled to the full panoply of fundamental due process guarantees. This much should be common ground.

"The fundamental requisite of due process of law is the opportunity to be heard." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). More to the point for present purposes, this Court has long held that, as part and parcel of the right to be heard, "[d]ue process requires that there be an opportunity to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quoting *American Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932)); *accord Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007); *Nickey v. Mississippi*, 292 U.S. 393, 396 (1934). It follows that a state-court class action may not be structured in such a way as to deny the defendant the opportunity to defend itself fully.

Not only is the defendant's due process right to present available defenses an indispensable element of the right to be heard, it is also the logical and necessary corollary to a plaintiff's due process right to present his or her claim on the merits. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) ("[A] cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause."). If a plaintiff has the right to *assert* a claim, then surely the defendant must also have the right to *defend* by challenging the plaintiff's proof. *See, e.g.*, *McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 231–32 (2d Cir. 2008) (depriving defendants of the right to challenge plaintiffs' allegations in a class action results in a due process violation). The Due Process Clause, after all, does not play favorites. It

"protect[s] civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Logan*, 455 U.S. at 429.

B. By Decreeing A *De Facto* Class Action Exception To Louisiana Fraud Law, The Louisiana Courts Deprived Defendants Of The Right To Raise Every Available Defense.

Federal rights may not be "nullified by the manipulation of state law." Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043, 1052 (1977). Accordingly, a state court cannot defeat a defendant's rights, such as the right to present a complete defense, by resorting to semantics or selectively distorting governing law.

This Court has enforced that foundational principle—that States cannot define constitutional rights out of existence—in numerous contexts. For instance, although as a general matter the "property interests" protected by the Due Process and Takings Clauses are creatures of state law, *see Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), this Court has clarified the commonsense point that a "State, by *ipse dixit*, may not transform private property into public property" and thereby circumvent constitutional guarantees. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). In *Webb's*, this Court held that the common-law "interest follows principal" rule reflects a core property right that warrants constitutional protection and rejected the notion that either "the Florida legislature by statute, [or] the Florida courts by judicial decree, may ... simply ...

recharacteriz[e] the principal as 'public money.'" *Id.* at 162, 164; *see also, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982) ("[T]he government does not have unlimited power to redefine property rights."). Thus, when a State regulates or limits property rights, it must act in accordance with preexisting "background principles of ... property law." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1031–32 (1992). *See also Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1212 (1994) (Scalia, J., joined by O'Connor, J., dissenting from the denial of certiorari) (observing that a State "cannot ... defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all") (quoting *Hughes v. State of Washington*, 389 U.S. 290, 296–97 (1967) (Stewart, J., concurring)).

In the same way, a state court cannot simply decree an unforeseeable exception to (or even a change in) otherwise applicable law in a way that deprives a litigant of liberty or property. The quintessential example is *Bouie v. City of Columbia*, 378 U.S. 347 (1964). There, two college students were convicted of misdemeanor trespass for remaining at a lunch counter after being told to leave. Although the statute of conviction forbade only "entry upon ... lands ... after notice ... prohibiting such entry," the state supreme court affirmed the convictions based on its *post hoc* construction of the statute to cover the act of refusing to leave. *Id.* at 348–50 & n.1. This Court reversed, holding that such "an unforeseeable and retroactive judicial expansion" of the statute violated the students' "right of fair warning" under the Due Process Clause. *Id.* at 352.

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), is to the same effect. There, an automobile manufacturer was ordered to pay $2 million in punitive damages because it failed to disclose that a car had been repainted after it was damaged before delivery. *Id.* at 562–67. This Court held that the award violated due process, in part because potentially applicable civil fines of $10,000 or less failed to give the defendant "fair notice" that its conduct would "subject [it] to a multimillion dollar penalty." *Id.* at 584. As the Court explained, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Id.* at 574.[2]

This case raises the same basic problem. The Louisiana courts deprived defendants of their rights as civil litigants—and, in the end, their property—by judicial *ipse dixit* and without any warning whatsoever. In particular, the courts below, acting arbitrarily and without any warrant in existing precedent, created an *ad hoc* exception to longstanding state fraud law. Although the courts below expressly acknowledged that fraud in Louisiana requires proof of individualized reliance, they inexplicably excused the plaintiffs' responsibility to prove the reliance element. *See* Pet. App. 46a ("Proof of fraud re-

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[2] Other examples abound. *See, e.g.*, *Reich v. Collins*, 513 U.S. 106, 111–14 (1994) (holding that a State may not refuse to refund taxes it has unconstitutionally exacted by the expediency of eliminating a taxpayer's settled, preexisting right to seek a "postdeprivation" refund, and that while a State may validly limit taxpayers to "predeprivation" challenges, it "may *not* ... reconfigure its [remedial] scheme, unfairly, in *midcourse*"); *accord Newsweek, Inc. v. Florida Dep't of Rev.*, 522 U.S. 442, 444-45 (1998).

quires causation in the form of reliance.... However, individual reliance is not at issue in the instant case."). By doing so, the courts "eliminated any need for plaintiffs to prove, and denied any opportunity for [defendants] to contest," an indispensable prerequisite of the plaintiffs' causes of action. *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 3 (2010) (Scalia, J., in chambers).

In particular, the Louisiana courts held that the plaintiffs in this case could satisfy their burden of proof by showing reliance "common to the class a whole"—*i.e.*, without showing reliance by any particular individual—and could do so based on a newfangled and amorphous "public knowledge" concept. Pet. App. 46a–47a, 65a. So long as the defendants "intentionally engaged in actions designed to distort" this body of "public knowledge," the courts held that the plaintiffs did not need to prove that the defendants induced any actual reliance—liability to the class as a whole would follow. *Id.* at 46a–47a.

These "class as a whole" and "public knowledge" constructs were whole-cloth creations—without any foundation in Louisiana law and conceived solely as a means of obscuring plaintiff-to-plaintiff differences and thus making a class action feasible. The Due Process Clause simply does not countenance such a fast-and-loose approach to settled law. *Cf. Williams*, 549 U.S. at 353–54 (holding that due process prohibits the imposition of punitive damages "for injuring a nonparty" because the defendant "has no opportunity to defend against the charge, by showing, for example ..., that the [nonparty] was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary").

In sum, in an effort to pound the square peg of the plaintiffs' claims into the round hole of a class action lawsuit, the Louisiana courts distorted the applicable substantive law—and, in the process, defendants' substantive rights—beyond all recognition. That, a state court may not do.

II. This Case Provides An Ideal Vehicle To Resolve Issues Of Tremendous Legal And Practical Significance.

Even after the enactment of CAFA, federal jurisdiction over class action litigation is hardly universal. Many high-stakes class actions remain in state court, where "the constraints of the Due Process Clause will be the only federal protection." *Scott*, 131 S. Ct. at 4 (Scalia, J., in chambers). The problem is that despite the number of class actions in state court, review of state class action procedure is difficult to obtain. The reason is that the vast majority of state class actions settle, and for well-known reasons. Class defendants facing the risk of ruinous liability, soaring defense costs, negative publicity, and the business disruptions that can attend class litigation often have little choice but to capitulate. *See Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("Class certification magnifies and strengthens the number of unmeritorious claims. ... In addition to skewing trial outcomes, class certification creates an insurmountable pressure on defendants to settle ....").

If the decision below is allowed to stand—simply sweeping aside weaknesses in and defenses to individual plaintiffs' claims on the ground that the case was brought on behalf of a purported "class as a whole"—the already-coercive settlement pressures threaten to in-

crease exponentially. Needless to say, that is an untenable position for American businesses and consumers alike.

This case is one of few class actions certified in state courts that did *not* settle. Indeed, defendants not only defended the case to verdict and judgment but also asserted their due process rights at every turn, ultimately resulting in three published appellate opinions directly or indirectly addressing the issues raised in the Petition. *See* Pet. App. 1a–30a, 31a–79a, 281a–303a. This case therefore presents the Court with a unique opportunity, in the context of a case tried to judgment, to address the due process limits on state class action procedure.

A. Even After CAFA, Many Large Class Actions Must Be Litigated In State Court.

As Congress recognized when it enacted CAFA, the class action device has been abused most often "in state courts, where the governing rules are applied inconsistently" and "frequently in a manner that contravenes basic fairness and due process considerations." S. Rep. 109-14, at 4 (2005); *see id.* at 21–23. Although CAFA addressed this problem in part by expanding federal-court jurisdiction over certain categories of class actions, many such actions continue to be filed in state court. And as this case demonstrates, removal is not always a ready solution; "major class action[s] ... will not be removable" under CAFA if they are "drawn to include only residents of" a single State. *Scott*, 131 S. Ct. at 4 (Scalia, J., in chambers).

Moreover, creative plaintiffs' attorneys continue to exploit loopholes in CAFA. For example, some attorneys now comb state-court records for small collections

actions in which to file "counterclaim class actions," thereby transforming small disputes over unpaid bills into sprawling, multimillion-dollar consumer class actions. At least according to some courts and commentators, such cases cannot be removed under CAFA regardless of the amount in controversy based on pre-CAFA case law interpreting the general removal statute, 28 U.S.C. § 1441, to prohibit removal by counterclaim defendants or additional counter-defendants. *See Palisades Collections LLC v. Shorts*, 552 F.3d 327, 330-37 (4th Cir. 2008), *cert. denied sub nom. AT&T Mobility LLC v. Shorts*, 129 S. Ct. 2826 (2009); Jay Tidmarsh, *Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*, 35 W. ST. U. L. REV. 193, 196–97 (2007). *But see Palisades Collections*, 552 F.3d at 337–45 (Niemeyer, J., dissenting and dissenting from the denial of rehearing en banc).

Empirical evidence confirms that significant class action litigation continues to occur in the state courts. For example, despite CAFA's enactment in February 2005, more than 750 class actions were filed in 2005 in California alone, the vast majority of which were not removable.[3] Although this figure represented a predicta-

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[3] ADMINISTRATIVE OFFICE OF THE CALIFORNIA COURTS, FINDINGS OF THE STUDY OF CALIFORNIA CLASS ACTION LITIGATION, 2000-2006: FIRST INTERIM REPORT 3-4, 25 (Mar. 2009) [hereinafter "California Class Action Study"], *available at* http://www.courtinfo.ca.gov/reference/documents/class-action-lit-study.pdf. CAFA took effect in February 2005. A sample of 177 of the 751 class actions filed in California in 2005 found that only 19.2% were permanently removed to federal court. *Id.* at 25. Federal Judicial Center researchers have relied on the California study in their analyses, noting that "reliable data on class action activity in most state court systems simply do not exist." Federal Judicial Center, *Progress Report to the Advisory Committee on Civil Rules on the Impact of*

ble decrease from the pre-CAFA high of 833 class actions filed in California in 2004, it significantly exceeded the number of class actions filed in the state in any of the four prior years. California Class Action Study, *supra* note 3, at 3–4. In other words, CAFA slowed, but for the most part did not defuse entirely, "the dramatic explosion of class actions in state courts." S. Rep. 109-14, at 14 (2005).

When a class defendant finds itself in state court—as often it will—its *only* federal protection is the Due Process Clause. It is therefore essential that this Court clarify the extent to which the Clause limits state courts' ability to distort otherwise applicable law as a means of making a class action work.

B. Most State Class Actions Settle Because Defendants Face Coercive Pressure To Capitulate Rather Than Litigate.

It is common knowledge that "the vast majority of certified class actions settle, most soon after certification." Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1291–92 (2002) ("[E]mpirical studies ... confirm what most class action lawyers know to be true."); *see also* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 99 (2009) ("With vanishingly rare exception, class certification [leads to] settlement, not full-fledged testing of the plaintiffs' case by trial."); Thomas E. Willging & Shannon R.

CAFA on the Federal Courts, at 4 (Nov. 2007), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CAFA ProgressReport-Final.pdf.

Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 647 (2006) ("[A]lmost all certified class actions settle.").

The reasons that so many class actions settle before trial are well-documented. Chief among them, of course, is that "[e]ven in the mine-run case, a class action can result in 'potentially ruinous liability.' A court's decision to certify a class accordingly places pressure on the defendant to settle even unmeritorious claims." *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1465 n.3 (2010) (Ginsburg, J., dissenting) (quoting FED. R. CIV. P. 23, advisory committee's note); *accord, e.g., Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *Castano*, 84 F.3d at 746. When a class is certified, the aggregation of claims in a single action creates an "enhanced risk of costly error." *Thorogood v. Sears, Roebuck & Co.*, 624 F.3d 842, 849 (7th Cir. 2010) (Posner, J.). If, for example, "a company is sued a number of times for selling a defective product," and "[i]t wins some of the cases and loses others," then "the aggregate outcome reflects more or less accurately the expected litigation value of the plaintiffs' claims." *Id.* "But when the central issue in a case is given class treatment" to be resolved "once-and-for-all" by a single trier of fact, "trial becomes a roll of the dice"; "a single throw may determine the outcome of an immense number of separate claims" and potentially impose staggering liability. *Id.* Because, to "put[] it mildly," a defendant "may not wish to roll these dice," there "will be ... intense pressure to settle." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, C.J.). Class certification threatens this ruinous liability, and thus creates coercive settlement pressure, even when the defendant is given

an opportunity in later proceedings to present individualized defenses. *Id.* When, as in this case, the defendant is *denied* that right, the risk –and the pressure—increases exponentially.

Liability risk forms only a part of the settlement pressure that class defendants face. In addition, "[c]lass actions are expensive to defend." *Cowen v. Bank United*, 70 F.3d 937, 941 (7th Cir. 1995) (Posner, C.J.); *see also Coopers & Lybrand*, 437 U.S. at 476 (noting that the threat of increased "litigation costs" may cause a defendant to "settle and ... abandon a meritorious defense" in the face of a certified class); FED. R. CIV. P. 23, advisory committee's note (same). In particular, "[o]ne purpose of discovery—improper and rarely acknowledged but pervasive—is: it makes one's opponent spend money." *Thorogood*, 624 F.3d at 849 (quotation marks omitted). "In most class action suits ... there is far more evidence that plaintiffs may be able to discover in defendants' records (including emails, the vast and ever-expanding volume of which has made the cost of discovery soar) than vice versa." *Id.* at 849–50; *see also* Louis W. Hensler III, *Class Counsel, Self-Interest and Other People's Money*, 35 U. MEM. L. REV. 53, 66 (2004) ("Corporate defendants' almost universally-voluminous files ... allow plaintiffs to impose, at the very outset of the litigation, huge document production costs...."). Accordingly, a defendant in a large class action may find it necessary to "settle a claim that appears to be without merit" simply to avoid the "burdensome" "cost of pre-trial discovery." Hensler, *supra*, at 65–66; *cf. also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) ("[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.").

Compounding the liability and defense-cost problems, the threat of poisonous publicity can also induce defendants to settle even weak class claims. Reports of wrongdoing by big companies "make good 'copy'—even if the allegations are seemingly spurious, commonplace or unproven." Steven B. Hantler, Victor E. Schwartz, Phil S. Goldberg, *Extending the Privilege to Litigation Communications Specialists in the Age of Trial By Media*, 13 COMMLAW CONSPECTUS 7, 10 (2004). Such reports typically lead with sensational accounts of the plaintiffs' unproven charges and alleged injuries and include the defendant's answer only secondarily, if at all. Moreover, while the plaintiffs' filing of a class action complaint is often a headline-grabbing event, the defendant's eventual refutation of the allegations typically receives little, if any, attention. *Id.* at 11 & n.15. It is therefore unsurprising that plaintiffs' lawyers in high-profile litigation often seek to "use the media as a vehicle" to coerce settlement by "driving down stock prices" and "vilifying the [defendant] among consumers." *Id.* at 8; *see also id.* at 31-32 (describing plaintiffs' lawyers use of this tactic in class actions against HMOs). It is equally predictable that "many ... defendants settle [such] cases under the theory that a bad settlement is better than a good lawsuit." *Id.* at 8 (quotation marks omitted).

Defendants may also choose to settle weak class claims to avoid the substantial business disruptions that class actions inevitably entail. From a business standpoint, the most significant cost is not the out-of-pocket liability or legal fees but the diversion of resources from productive activity. As this Court has noted, "[t]he very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unre-

lated to the lawsuit." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975). Time that employees spend reviewing documents, meeting with attorneys, and preparing for or attending depositions is time spent away from the company's core business. Thus, "a plaintiff with a largely groundless claim [may] simply take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence." *Id.* at 741. Such disruption "is a social cost rather than a benefit." *Id.*

Finally, class actions can also impose crippling opportunity and investment costs. "A $50 million lawsuit against a company can easily prevent that company from raising $250 million or even $500 million in debt or equity to finance new, productive business activities." Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367, 374 (2009). "At the very least, the uncertainty surrounding a significant potential liability may increase a company's cost of capital by depressing its stock price or increasing the interest rate it must pay on its debt." *Id.*; *see also* Hantler et al., *supra*, at 31-32 (describing how Aetna's stock dropped 30% following plaintiffs' lawyers meetings with Wall Street analysts regarding HMO class actions). In some cases, such opportunity or investment costs "dwarf the primary costs" of the class action itself. Molot, *supra*, at 374–75.

In sum, a certified class action can create a perfect coercive storm. The risk, however remote, of ruinous liability combines with high defense costs, negative publicity, and the drag on business operations to produce an environment in which settlement often becomes the only

option. It is therefore hardly surprising that class certification—particularly in state court, where federal protection resides solely in the Due Process Clause—precipitates prompt settlement in the vast majority of cases.

C. The Rulings Below Will Exacerbate The "Blackmail Settlement" Problem.

Subjecting class defendants to coercive settlement pressures "even when the probability of an adverse judgment is low" has "been referred to as judicial blackmail." *Castano*, 84 F.3d at 746. Courts, of course, are "legitimate[ly]" "concern[ed] about" such "'blackmail settlements.'" *Rhone-Poulenc*, 51 F.3d at 1298 (quoting HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)).

The risk of blackmail settlements demands careful attention to and rigorous application of the requirements for certifying class actions in the first instance, both under the Federal Rules of Civil Procedure and under the Due Process Clause. *See Taylor v. Sturgell*, 553 U.S. 880, 900–01 (2008) ("In the class-action context," due process protections "are implemented by the procedural safeguards contained in Federal Rule of Civil Procedure 23."); *see also Wal-Mart Stores, Inc. v. Dukes*, __ S. Ct. ___, 2010 WL 3358931 (Dec. 6, 2010) (No. 10-277). Beyond that, and particularly relevant here, the blackmail risk also demands close scrutiny of the procedures applied at trial in order to ensure that courts are not distorting governing legal principles or denying due process protections in the name of expediency. *See supra* pages 4–11; Pet. 14–28.

To be clear, the fact that most certified class actions settle before trial does not render "unimportant" the

need to police state courts' procedures in the class actions that do go to trial. *See* Robert H. Mnookin & Robert B. Wilson, *Rational Bargaining and Market Efficiency: Understanding* Pennzoil v. Texaco, 75 VA. L. REV. 295, 295 (1989). In fact, just the opposite is true. Litigants "bargain with the knowledge that if they cannot strike a deal, a court ultimately may impose a resolution." *Id.* "[T]he rules and procedures used inside of court" thus "substantially affect[] the bargains reached outside of court." *Id.*

Accordingly, if—as here—the effect of a ruling certifying a class is to preclude examination of evident weaknesses in the plaintiffs' claims, or to preclude the defendant from presenting available defenses, then the case's blackmail value will skyrocket. As already noted, even in the best of circumstances, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand*, 437 U.S. at 476. If class certification effectively deprives the defendant of the right to present meritorious defenses—or relieves plaintiffs of the burden of proving necessary elements of their claims—then the defendant's bargaining position will evaporate entirely and the settlement pressure will, in almost all cases, become overwhelming. *Cf.* Nagareda, *supra*, at 103 ("If a cohesive class can be created through ... savvy crafting of the evidence," then "[t]he law [will] run a considerable risk of unleashing the settlement-inducing capacity of class certification based simply upon the say-so of one side."). And to make matters worse, if class certification comes to be viewed as a means of avoiding strong defenses to weak claims, class litigation will mushroom as "the attraction of such lawsuits [will]

become[] apparent to an ever-increasing number of plaintiff lawyers." *Cf.* Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain, Executive Summary*, at 10 (Rand Inst. for Civ. Justice 1999), *available at* http://www.rand.org/content/dam/rand/pubs/monograph_reports/2005/MR969.1.pdf.

D. This Case Provides An Ideal Vehicle For Resolving Recurring Constitutional Issues Of Nationwide Importance.

As already explained, although class action treatment can frequently result in a denial of a defendant's constitutional rights, the class-certification pressure-cooker often precludes trial on the merits. Without a trial—and the appellate review that eventually ensues—constitutional wrongs simply go unaddressed.

This case, which resulted in a trial, verdict, judgment, and three reported appellate decisions, is a unique exception to the general rule.[4] The complete record of the trial and its subsequent review by the Louisiana courts provides the Court an ideal vehicle to address the question whether and to what extent the Due Process Clause limits state courts' ability to force class treatment by distorting the governing law and eliminating defendants' right to present available defenses. The record below amply demonstrates the fundamental unfairness

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[4] Indeed, in the California courts' study of class action litigation discussed above, out of 289 certified class actions, only *two* were tried to verdict. ADMINISTRATIVE OFFICE OF THE CALIFORNIA COURTS, CLASS CERTIFICATION IN CALIFORNIA: SECOND INTERIM REPORT FROM THE STUDY OF CALIFORNIA CLASS ACTION LITIGATION tbl.D.1 (Feb. 2010), *available at* http://www.courtinfo.ca.gov/reference/documents/classaction-certification.pdf.

of such distortions and denials. And, as the protracted proceedings and nine-figure judgment indicate, few defendants will have the wherewithal to risk a massive judgment in order to press these important issues. Rather, as a result of the coercive pressure to settle even weak cases, these issues will rarely see the light of trial, let alone make their way to this Court. The Court should take this opportunity to provide guidance on such important constitutional questions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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